IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
March 12, 2009 Session

MICHAEL AND CAROLYN REGEN v. EAST FORK FARMS, LP, ET AL.

Appeal from the Chancery Court for Davidson County
No. 07-2882-II Carol L. McCoy, Chancellor

No. M2008-01414-COA-R3-CV - Filed November 4, 2009

The trial court granted summary judgment in favor of the easement holder in a declaratory judgment action by the servient estate landowners. The landowners appealed, maintaining that the increase in traffic on the easement resulting from the new use of the easement holder's land will unreasonably burden the easement. We affirm the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

ANDY D. BENNETT, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR. and RICHARD H. DINKINS, JJ., joined.

George Arthur Dean and Ben H. Cantrell, Nashville, Tennessee, for the appellants, Michael Regen and Carolyn Regen.

C. Dewees Berry, Nashville, Tennessee, for the appellees, East Fork Farms, LP and Jane Cleveland.

OPINION

FACTUAL AND PROCEDURAL BACKGROUND

This case involves a dispute over the use of an easement on property located off Highway 96 in Davidson County. The property at issue was owned by Elmer and Gloria Jones, the parties' predecessors in interest. In 1985, the Joneses conveyed their interest in Parcel 65[1] to James and Helen Bradford. On August 19, 1986, the Bradfords granted an easement to the Joneses by executing a Deed for Easement (the "easement"). The easement provided the Joneses with access across a portion of Parcel 65 to Little East Fork Road. The easement expressly stated that the

[1] All parcel designations refer to those identified on the Metropolitan Government of Nashville & Davidson County Property Map 178.

purpose of the easement was for "ingress and egress from the [Joneses'] real property to a road sometimes known as Little East Fork Road or Old Highway 96." It further granted the Joneses:

> full and free right and authority to use so much of Grantors' aforementioned real property . . . as is necessary for the purpose of providing ingress and egress to Grantees' tract of property from the said road sometimes referred to as Little East Fork Road, or Old Highway 96, with the right of Grantees, their heirs or assigns, to construct and maintain upon said easement such permanent road surface and/or appurtenances thereto as are consistent with the purposes of said easement as herein contained.

The easement is approximately thirty feet long.

Eventually, Michael and Carolyn Regen purchased the property known as Parcel 65. In April 2006, Jane Cleveland purchased Parcel 68. She also bought a portion of Parcel 67 that became known as Parcel 77. Both Parcels 68 and 77 were part of the Jones property when the easement was granted. Before purchasing Parcel 77, Ms. Cleveland applied for a commercial special exception to build East Fork Farms, a 30,000-square-foot stable. On July 12, 2006, the Metropolitan Board of Zoning Appeals issued the special exception, subject to these conditions:

> [N]o public events. Limited to a maximum of 24 horses, must maintain 200' setback from any building to the property line adjacent to the Regen property, a maximum of a 94' setback from other property line must be maintained, no bleachers, no lighting of arenas, normal outside lighting only, and no events after 6 pm.

The Regens filed suit on December 27, 2007, against Jane Cleveland and East Fork Farms, LP. They did not oppose the use of the property and did not appeal the decision of the zoning board. Their concern was the effect of East Fork Farms on the easement across their property. The Regens believed that the changed use of the Cleveland property would unreasonably increase the burden on their property by increasing traffic on the easement. Cleveland filed an answer and counterclaim. On April 15, 2008, she filed a motion for summary judgment supported by her own affidavit and an affidavit from Paul Weatherford, a surveyor. The Regens opposed the motion and supplied affidavits from Carolyn Regen and James Lech, an urban planner. On June 2, 2008, the trial court granted summary judgment to Cleveland, finding that "the motion is well taken and should be granted. There is no genuine issue of material fact and the movant is entitled to judgment as a matter of law."[2] Cleveland subsequently voluntarily dismissed her counterclaim against the Regens. The Regens voluntarily non-suited their claim against East Fork Farms, LP. The Regens appealed the grant of summary judgment, arguing that the commercial stables will unreasonably increase the burden on the easement.

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[2] The trial court apparently did not pay heed to the July 2007 amendment to Tenn. R. Civ. P. 56.04 which requires that "[t]he trial court shall state the legal grounds upon which the court denies or grants the motion, which shall be included in the order reflecting the court's ruling."

STANDARD OF REVIEW

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. Tenn. R. Civ. P. 56.04. Summary judgments do not enjoy a presumption of correctness on appeal. *BellSouth Adver. & Publ'g Co. v. Johnson*, 100 S.W.3d 202, 205 (Tenn. 2003). We consider the evidence in the light most favorable to the non-moving party and resolve all inferences in that party's favor. *Godfrey v. Ruiz*, 90 S.W.3d 692, 695 (Tenn. 2002). When reviewing the evidence, we must determine whether factual disputes exist. *Byrd v. Hall*, 847 S.W.2d 208, 211 (Tenn. 1993). If a factual dispute exists, we must determine whether the fact is material to the claim or defense upon which the summary judgment is predicated and whether the disputed fact creates a genuine issue for trial. *Id.*; *Rutherford v. Polar Tank Trailer, Inc.*, 978 S.W.2d 102, 104 (Tenn. Ct. App. 1998). To shift the burden of production to the nonmoving party who bears the burden of proof at trial, the moving party must negate an element of the opposing party's claim or "show that the nonmoving party cannot prove an essential element of the claim at trial." *Hannan v. Alltel Publ'g Co.*, 270 S.W.3d 1, 8-9 (Tenn. 2008).

ANALYSIS

An easement is an interest in another's real property that confers on the easement holder an enforceable right to use that real property for a specific purpose. *Bradley v. McLeod*, 984 S.W.2d 929, 934 (Tenn. Ct. App. 1998) (citing *Brew v. Van Deman*, 53 Tenn. 433, 436 (1871)), *overruled in part on other grounds by Harris v. Chern*, 33 S.W.3d 741 (Tenn. 2000).[3] This case involves an easement created by a grant, so the extent of the easement is determined by the language of the grant. *Foshee v. Brigman*, 129 S.W.2d 207, 208 (Tenn. 1939). Furthermore, the courts have said:

> The extent of an easement is determinable by a true construction of the grant or reservation by which it is created, aided by any concomitant circumstances which have a legitimate tendence to show the intention of the party. It is not proper, however, to refer to the parol negotiations which preceded or accompanied the execution of the instrument. If the grant is specific in its terms, it is of course decisive of the limits of the easement.

Henry v. Tenn. Elec. Power Co., 5 Tenn. App. 205, 208 (1927). Thus, the language of the easement is the primary guide for the courts.

The easement document in this case states that the easement is for the purpose of ingress and egress to the property now owned by Cleveland. "One granting an easement may limit the grant in any way he chooses, and the grantee takes subject to the restrictions imposed." *Id.* The easement

[3] The easement in this case is an easement appurtenant. "In an easement appurtenant, there are two tracts of land, the dominant tenement, and the servient tenement. The dominant tenement benefits in some way from the use of the servient tenement." *Pevear v. Hunt*, 924 S.W.2d 114, 116 (Tenn. Ct. App. 1996). An easement appurtenant passes by deed and follows the land. *Lynn v. Turpin*, 215 S.W.2d 794, 796 (Tenn. 1948).

contains no restrictions on what types of vehicles may use the easement, no limitations as to the number of vehicles that may use the easement during any given time, and no conditions on the use of the property for which the ingress and egress is provided.

Faced with this ingress/egress easement, the Regens maintain that the new enterprise on the Cleveland property will unreasonably increase the burden upon the easement. This is a genuine issue of fact, they say, that remains in dispute, and therefore, summary judgment was not appropriate. The Regens suggest the burden on the easement would be increased by the change in use of the dominant estate (the Cleveland property) from residential to commercial, the increased use of the easement, the expansion of a bridge, and the availability of other access to Little East Fork Road.

As we have already observed, the easement contains no limitations on the use of the Cleveland property. In the absence of such a restriction, it can hardly be claimed that the change of use of the property affects the easement in any way.[4] Furthermore, it is not so much the change in the use of the dominant estate that matters, but rather the burden that change places upon the easement and the servient estate:[5]

> Except as limited by the terms of the servitude . . . , the holder of an easement . . . is entitled to use the servient estate in a manner that is reasonably necessary for the convenient enjoyment of the servitude. The manner, frequency, and intensity of the use may change over time to take advantage of developments in technology and to accommodate normal development of the dominant estate or enterprise benefited by the servitude. Unless authorized by the terms of the servitude, the holder is not entitled to cause unreasonable damage to the servient estate or interfere unreasonably with its enjoyment.

RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 4.10 (2000).

The Regens argue that the increase in traffic to the dominant estate will unreasonably burden the easement. The law, however, does not favor their argument. Generally, "an *increase in traffic* over an easement in the process of normal development of the dominant estate, in and of itself, does not overburden a servient estate." *Weeks v. Wolf Creek Indus., Inc*., 941 So. 2d 263, 272 (Ala. 2006) (emphasis in original); *see also Stew-Mc Development, Inc. v. Fischer*, 770 N.W.2d 839, 847 (Iowa

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[4] The Regens' brief suggests, without discussion, that the placement of a commercial use on the Cleveland property is inconsistent with the intentions of the parties at the time of the creation of the easement. The best indication of the intent of the parties is the language of the easement itself, and as we have already seen, the easement contains no limitation whatsoever as to the future use of the Jones (now Cleveland) property. Courts are generally unwilling to find restrictions on the use of land by implication. *See O'Leary v. Hall*, No. 03A01-9507-CH-00235, 1996 WL 84852, at *4 (Tenn. Ct. App. Feb. 27, 1996) ("In the absence of language in the original deed specifically prohibiting subdivision, this Court will not find a restriction by implication.").

[5] The dominant estate is the property that benefits from an easement while the servient estate is the property burdened by the easement. BLACK'S LAW DICTIONARY 589 (7th ed. 2004).

2009); *Gutcheon v. Becton*, 585 A.2d 818, 822 (Me. 1991); *Downing House Realty v. Hampe*, 497 A.2d 862, 865 (N.H. 1985); *Shooting Point, L.L.C. v. Wescoat*, 576 S.E.2d 497, 503 (Va. 2003); RESTATEMENT (THIRD) OF PROP., § 4.10, cmt f. The increase in traffic is merely an increase in the degree of the burden, not an additional burden.[6] *Shooting Point, L.L.C.*, 576 S.E.2d at 503.

Since the increase in traffic does not unreasonably burden the easement as long as the increase is caused by the normal development of the dominant estate, the question becomes whether the use of the Cleveland property as a commercial stable is normal development. Common sense dictates that the change in use from residential/agricultural rural land to housing and training horses is a normal development. In this instance, common sense is supported by the law. The Regens point out that the Cleveland property is zoned AR2a,[7] a designation the Metropolitan Code characterizes as an agricultural district. M.C.L. § 17.08.010A. The Metropolitan Code indicates the permissible uses for such properties. Specifically, the chart in M.C.L. § 17.08.030 indicates that the landowner of property zoned AR2a has the right to use the property in a variety of ways, including single family residential, mobile home, park, and agricultural activity.[8] These uses are deemed by the Metropolitan Government ("Metro") to be compatible with the area. Stables are permitted if a commercial special exemption is granted. M.C.L. §§ 17.08.030, 17.16.175. Thus, as a matter of law, Metro considers a facility such as the one proposed for the Cleveland property to be appropriate, normal development for the area.

Finally, the Regens contest Cleveland's statement that her property is functionally landlocked. They note that Cleveland's property has frontage on Little East Fork Road and maintain that it would not be impractical or inconvenient for Cleveland to use part of this frontage for ingress and egress. If the easement in question was an easement of necessity, this argument would be worth pursuing. It is, however, irrelevant to an easement by express grant. "The rule that the easement

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[6] The Regens' brief mentions that the bridge in the easement must be expanded and the public road widened as indications of "an unreasonable increase in the burden on the servient estate." Since the brief does not describe the nature of the burden created, we take the Regens to mean that these improvements are indicative of expected increased traffic. The discussion in the body of this opinion covers the traffic issue.

[7] The Metropolitan Code states:

> The AG and AR2a districts are designed for uses that generally occur in rural rather than urban areas. These districts permit very low density residential development generally on unsubdivided tracts of land where public sanitary sewer service and public water supply are least practical. Because of their rural character, these districts will better accommodate some of the more impactive special exception uses that must be located within the county. By application of effective locational and operational standards, it is the intent of this title to minimize the impacts of such uses on residential home sites scattered throughout these districts.

M.C.L. § 17.08.020A.

[8] Other uses are also permitted as of right, including use of the land as an orphanage, religious institution, assisted care living, hospice, or nursing home. The degree and abruptness of the change of use of the dominant estate may indicate that the new use of the dominant estate is not normal development. RESTATEMENT (THIRD) OF PROP., § 4.10, cmt. f. These examples represent more drastic land use changes than in the instant case.

ceases with the necessity has no application to such an express easement." *Smith v. Adkison*, 622 S.W.2d 545, 547 (Tenn. Ct. App. 1981). Cleveland owns an express easement, and her right to use it is not dependent on the absence of alternative access to her land. *Cole v. Dych*, 535 S.W.2d 315, 319 (Tenn. 1976); *Cottrell v. Daniel*, 205 S.W.2d 973, 976 (Tenn. Ct. App. 1947).

CONCLUSION

The Regens, as plaintiffs, had the burden of showing that the increased traffic placed an unreasonable burden on the easement. As a matter of law, an increase in traffic due to the normal development of the dominant estate does not constitute an unreasonable increase in the burden on an easement for ingress and egress. The placement of commercial stables on the Cleveland property is normal development of AR2a zoned property in accordance with the Metro zoning laws. Cleveland has shown that the Regens cannot prove their claim and is entitled to summary judgment as a matter of law. The trial court is affirmed.

Costs of appeal are assessed against the appellants, Michael and Carolyn Regen, for which execution may issue if necessary.

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ANDY D. BENNETT, JUDGE